



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

POINDEXTER V. MAY.

February 15, 1900.

1. **STATUTES—Local—General—Repeal of one by another.** The passage of a local statute expressly applicable to only one county of the State in no way repeals, supersedes or effects an existing general law in the same words as the local law, except that applicable to all the counties of the State.
2. **FENCES—Common law rule—Virginia rule—“No fence law.”** The rule of the common law which requires the owner of animals to keep them on his own land or within enclosures is not in force in this State except in those counties where the board of supervisors have adopted the “no fence law” as provided by section 2048 of the Code. The owner of animals is under no obligation to restrain them and is not liable for damage done by them in consequence of straying on the unenclosed lands of another. Without a lawful fence the land owner can maintain no action for such damages. The common law rule is contrary to the public policy of this State as manifested by legislation from the earliest period until the present time.
3. **CONSTITUTIONAL LAW—Fences.** A fence law which requires a land owner to enclose his land by a lawful fence as a prerequisite to the right to recover for damages done by trespassing animals violates no right of the land owner granted to him by the constitution of the State or of the United States.
4. **FENCE LAW—Wilful trespass—Damages.** Although the fence law of this State does not require the owner of cattle to restrain them from passing of their own accord upon the unenclosed lands of another, it gives such owner no authority to drive them there, and if he does he is answerable for whatever damage they may do while there.

Appeal from a decree of the Circuit Court of Louisa county, pronounced January 9, 1899, in a suit in chancery, wherein the appellee was the complainant, and the appellant was the defendant.

Affirmed.

The opinion states the case.

Iyons, Campbell & Johnson, for the appellant.

A. K. and D. H. Leake and John G. May, for the appellee.

HARRISON, J., delivered the opinion of the court.

The bill in this case alleges that appellee is the owner of a tract of land in Louisa county with young fruit trees, grass, and herbage grow-

ing thereon; that said land is enclosed by a fence, but not such a fence as is defined by the Code of Virginia to be a lawful fence; that appellant is in the possession and management of adjacent land, with cattle and horses thereon, and has been in the habit of turning said cattle and horses upon the lands of appellee, and still continues thus to trespass upon him, thereby injuring his fruit trees, and destroying his grass and herbage; that inasmuch as appellee's fence is not such as the law prescribes as a lawful fence, appellant claims the right to turn his stock upon appellee's land, and says he will continue to do so until prohibited by some competent authority. The bill further alleges that appellant is utterly insolvent, and that unless restrained irreparable injury and mischief will result to appellee from such trespass. The prayer of the bill is that appellant may be restrained from further violation of appellee's rights.

A temporary injunction was granted restraining and enjoining appellant from allowing, permitting or suffering his cattle and horses to trespass upon appellee's premises, until the further order of the court. At the following term of the court, appellant filed his demurrer and answer, in which he admits the statements contained in the bill to be true, and insists that inasmuch as appellee's land is not enclosed by a lawful fence as defined by the Code of Virginia, his cattle and horses have a right to run thereon, and that appellee is entitled to no remedy for the injury complained of.

Upon a final hearing the Circuit Court of Louisa overruled the demurrer, and decreed that the injunction awarded, restraining and enjoining appellant from allowing, permitting or suffering his cattle and horses to trespass upon appellee's premises, be modified so as to perpetually restrain appellant from turning his horses and cattle in and upon the lands of appellee.

The appellant assigns as error (1), the action of the court in overruling the demurrer; and (2), its action in granting the injunction restraining him from turning his cattle upon appellee's land.

Under Rule IX, the appellee assigns as error the action of the court in refusing to restrain appellant from allowing, permitting or suffering his cattle to stay upon appellee's land.

The questions involved arise, alike, upon the demurrer and upon the hearing, and will be considered in the order best calculated to subserve convenience in statement.

The first contention of appellee is, "that there is no statute law in Virginia requiring the land owner to maintain a lawful fence as defined

by section 2038 of the Code, as a condition precedent to his right to recover damages for trespassing cattle, except as to the county of Accomac."

The entire fence law of Virginia, at the time of the adoption of the present Code (1887), was to be found in chapter 93 of that revision from section 2038 to section 2061 inclusive. Section 2038 defined what should constitute a lawful fence. Since the adoption of the Code several acts have been passed, which appellee claims have had the effect of repealing section 2038 and leaving no general statute in Virginia defining what shall be deemed a lawful fence. This section seems to have had singular treatment at the hands of the Legislature, but when the several acts, touching it, are carefully examined, we think it will clearly appear that although the section, *eo nomine*, has disappeared, still the law, in the same words, has survived the difficulties and dangers to which it has been subjected.

By act of 1889-90, p. 945, section 2038 of the Code was re-enacted and made to apply only to Orange county. This act was repealed by act of 1893-4, p. 948, which last named act concludes with these words, "and section 2038 of the Code of 1887 is hereby re-enacted." The Legislature, no doubt, seeing that this mode of re-enacting section 2038 was invalid because in conflict with Art. 5, section 15 of the State Constitution, which provides that when a law is re-enacted it must be published at length, passed on the same day (Acts 1893-4, p. 941) an act in these words: "*Be it enacted by the General Assembly of Virginia, that every fence five feet high, which, if the fence be on a mound shall include the mound to the bottom of the ditch, shall be deemed a lawful fence as to any of the stock named in section two thousand and forty-two of the Code of Virginia, which could not creep through the same.*"

The title to this act is as follows: "*An act to define what shall be a lawful fence in Virginia.*"

This act is in the words of section 2038 of the Code, which had, as we have seen, been repealed, as a general law, by the act of 1889-90, p. 945. It, however, makes no reference to that section and is therefore an independent general statute defining what shall be deemed a lawful fence in the State of Virginia.

By act of 1897-8, p. 651, section 2038 of the Code is again re-enacted, but is by the express terms of the title made to apply alone to the county of Accomac. Why this act should have been passed when the act of 1893-4, in the same words, was on the statute book

and applicable to Accomac county, it is difficult to understand. While, however, it adds nothing to the fence law of Accomac county, it in no way repeals, supersedes, or affects the general law found in the Acts of 1893-4, p. 941.

This review of these several enactments brings us to the conclusion that the general fence law of Virginia is now to be found in chapter 93 of the Code of 1887, except section 2038, and the amendment thereof, together with the act of 1893-4 (p. 941), which is in the words of section 2038.

It is further contended that these statutes do not repeal either expressly or by implication the common law rule which requires the owners of cattle to keep them upon their own lands on pain of becoming liable in trespass for their entry upon the lands of others, and that therefore the land owner can, as at common law, maintain his action for trespass, in case the cattle of another stray upon his land, although he may not have a lawful fence such as the statute prescribes.

From the early history of Virginia as a colony to the present time, her laws touching the subject of "enclosures and certain trespass" have been, in effect, the same. The statute of 1631 (1 Hen. 176), provides that "Every man shall enclose his ground with sufficient fences upon their own peril." The act of 1632 (1 Hen. 199), reads: "Every man shall enclose his ground with sufficient fences or else to plant upon their own peril." The act of 1657 (1 Hen. 458), provides that if the land owner does not maintain a sufficient fence, whatsoever trespass or damage he shall sustain "shall be his own loss or detriment," and provides further that he shall be liable for any damage to stock going upon his land, when his fence is not such as required by the statute, and that he shall be liable to double damage if the injury to such stock be wilful; and that if the land owner shall maintain such a fence as the statute requires, that then the owner of any cattle shall be liable to make compensation for any damage or trespass committed by his cattle upon the land so enclosed. Thus the law has continued, varying somewhat in form but little in substance, until the present time. The ancient statutes from which we have quoted, show what has been the policy of the law in respect to the matter of "enclosures and certain trespass" for centuries.

As already seen, the act of 1893-4 defines what shall be deemed a lawful fence. Section 2042 of the Code of 1887, as amended by act of 1897-8, p. 524, provides, in effect, that where a man has a lawful fence and his lands are trespassed upon by the cattle of another, then

the owner of the cattle shall be liable for damages, and also to a fine, etc.

Section 2048, as amended by act of 1895-6 (p. 466), provides that the board of supervisors of any county may declare the boundary lines of each lot or tract of land in each county or in any magisterial district, or any selected portion thereof, to be a lawful fence, and that when this is done in the mode prescribed, section 2038, defining a lawful fence, shall be inoperative.

It is unnecessary to prolong this opinion by quoting at length from the statutes referred to, as comprising the present fence law. It is sufficient to say that the rule of the common law which requires the owner of animals to keep them on his own land or within enclosures is not in force in Virginia, being inconsistent with the legislation of the State touching the subject of "enclosures and certain trespass;" except in those counties where the Boards of Supervisors have acted under section 2048 as amended, and adopted what is commonly known as the "no fence law;" the common law rule being restored in the localities where such action has been taken.

The general law imposes on the land owner no obligation to fence, but when land is left unenclosed the owner takes the risks of trespass thereon by the animals of others running at large, and can maintain no action for such trespass. A "lawful fence" is, necessarily, a condition precedent to the rights to recover; the statute plainly indicates this, and to hold otherwise would annul the whole law on the subject.

In the case of *Baylor v. B. & O. Ry.*, 9 West Va. 270, where this subject was considered, the president of the court, after showing that the law of that State was taken largely from ours, says: "On examination of the statutes of Virginia and West Virginia, above referred to, I am of opinion that the said common law rule, requiring the owners of cattle to keep them upon their own lands, on pain of becoming liable in trespass for their entry upon the lands of others, was not in force within the boundaries of this State, except those which are unruly and dangerous, and that if it was ever in force in Virginia, it was repealed at an early day in her history. I am not aware of any case in which it has ever been held in Virginia or West Virginia that the owner of cattle who suffered his cattle to run at large from his own lands upon the unfenced lands of others, was liable as a trespasser, in damages to other land owners upon whose lands his cattle strolled where they were not unruly or dangerous; nor indeed in any case, except the land entered was enclosed by a lawful fence."

It is further contended that the "fence law" is unconstitutional because in violation of the inherent right secured to every one of "the means of acquiring and possessing property," and also because in violation of the further constitutional provision that "private property shall not be taken for public uses without just compensation."

Although the people of Virginia have been living under these "fence laws" for nearly three hundred years, and there have been several constitutions adopted since the foundation of the government, in which no reference is made to the subject, this is the first time, so far as we know, that their constitutionality has been questioned in this court.

We entertain no doubt of the validity of the laws under consideration. They were intended for the mutual benefit, convenience and welfare of all the citizens of the commonwealth. They do not appropriate private property for public use, but simply regulate its use and enjoyment. Nor do they interfere with "the means of acquiring and possessing property." There is nothing in the statutes in question which gives or pretends to give any right to any person to enter upon another's land, and commit any trespass thereon, whether the land be fenced or not. They do not impair the rights of private property, nor in any manner interfere with the disposal thereof. They provide a reasonable protection for the rights of owners of enclosed land, and limit the right of redress for trespass to those injuries which result from their own non-compliance with the law. The legislature has the power to regulate the relative rights and responsibilities of the proprietors of enclosed land and the owners of stock that is allowed to run at large; and can, therefore, take from every man his remedy for a trespass by cattle, unless he enclose his lands with a lawful fence, without violating any right guaranteed by the constitution of the State or the United States.

The constitutionality of laws, similar to our own, has been upheld in a number of the States. *Wills v. Walters*, 5 Bush. 351; *Clark v. Stipp*, 75 Ind. 114; *Chase v. Chase*, 15 Nev. 259; *Bilen v. Paisley*, 18 Oregon, 47. See also *R. R. Co. v. Emmons*, 149 U. S. 364.

It is further contended by appellee that if the "fence law" be valid, it can only apply to the trespassing cattle of a person owning or legally occupying an adjoining close. It is a sufficient answer to this, that the bill alleges, and all of its allegations are admitted by the answer, that the land is in the possession and under the management of appellant, who has in his possession and under his control on said farm

the stock complained of. And the statute provides that if any cattle, etc., shall enter into any grounds enclosed by a lawful fence, the owner or manager of any such animal shall be liable, etc.

The position taken by appellant that he has a right, under the fence law, to turn his cattle in and upon his neighbor's premises, where the latter has failed to enclose his land with a lawful fence, is wholly without merit. The fence law has not repealed, or in any way impaired the full force and effect of the common law rule with respect to wilful or malicious trespass. The ancient maxim that no man shall take advantage of his own wrong in his prosecution or defence against another, is also in force and controlling in this connection.

While the statutes in question do not require the owner to restrain his cattle from passing of their own accord upon the unfenced lands of another, they give him no authority to drive them there, and if he do so he is answerable for whatever damage they may do while there. *Melody v. Reab*, 4 Mass. 471; *Delaney v. Errickson*, 11 Neb. 533; *Caulkins v. Mathews*, 5 Kan. 199.

For these reasons, the decree appealed from must be affirmed.

Affirmed.

NOTE.—This case involves a somewhat novel question under the fence laws, namely, whether the owner of cattle may actively turn them into the premises of another, where such premises are enclosed, but not with a lawful statutory fence. The court holds that such an act constitutes a willful trespass, remediable in damages, and by injunction in a proper case.

The case also involves the preliminary question whether, under recent and bungling legislation on this subject, there is any statute in this State defining a lawful fence.

The court holds very properly that while sec. 2038 of the Code—the only section in the volume undertaking to define a lawful fence—has been so tinkered with as to confine its operation to possibly a single county, the definition is yet preserved by Acts of 1893–4, p. 941, which, happily, was enacted as an independent statute, not in terms purporting to amend sec. 2038. It therefore escaped the eye of the Code tinkerer and the sad fate of that section. It also escaped the eye of the reviewer, in 3 Va. Law Reg. 463.

The case is authority for an important principle in the construction of the constitutional provision (Art. V., sec. 15, Va. Const.,) that “no law shall be revived or amended with reference to its title, but the act revived or the section amended shall be *re-enacted and published at length*.” This principle is, that an independent statute which amends another only by implication, and not in terms, is not violative of this constitutional provision, though it do not re-enact and republish the statute so amended. No authority is cited, but the ruling is manifestly sound, and is abundantly sustained by authority. The provision in question, requiring amended statutes to be re-enacted and republished at length, was not to prohibit

two complete and independent, though possibly inconsistent, statutes on the same subject, but to avoid having new terms engrafted upon an act by a simple enactment, in itself incomplete, referring to the act to be amended, and declaring that certain words shall be added thereto or taken therefrom, leaving the reader to insert or erase for himself. *Cooley's Const. Lim.* 151-152; *Anderson v. Com.*, 18 Gratt. 295, 300; *Davis v. State* (Md.), 61 Am. Dec. 331 and note; 3 Va. Law Reg. 367.

The opinion seems to be sound throughout.

The rule that one cannot drive his cattle upon the lands of another, where the latter's enclosure does not conform to the statute, would equally apply where there was no enclosure at all. One may therefore turn his cattle (if not vicious or unruly—and in absence of the "no-fence" law) out of his own enclosure, to wander where they will, without liability for any trespass they may commit, save to premises lawfully enclosed. But he cannot direct their steps to his neighbor's premises, be the latter's pastures ever so open or inviting.

BURDINE V. BURDINE'S EX'OR.*

Supreme Court of Appeals: At Staunton.

September 13, 1900.

Absent, *Riely, J.*

1. SPECIFIC PERFORMANCE—*Agreement to make a will—Death of intended testator.*
An agreement to dispose of property by will cannot, strictly speaking, be specifically enforced, not in the lifetime of a party, because wills are revocable; nor after his death, because it is no longer possible for him to make a will; but equity can do what is equivalent to specific performance by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with the terms of the agreement on the ground that it is charged with a trust in the hands of an heir, devisee, personal representative or purchaser with notice.
2. CONTRACTS—*Uncertainty.* The agreement in this case is not too uncertain and indefinite to be enforced.
3. CONTRACTS—*Statute of frauds—Contract signed by one party—Performance by other—Personal services.* Although an agreement to devise and bequeath land and personal property in consideration of personal services to be rendered, is signed only by the intended testator, yet if such services have been fully rendered the agreement is binding on the party who has signed the agreement and will be enforced against him.
4. MASTER AND SERVANT—*Misconduct of servant—Failure to discharge—Waiver—Condonation.* If a master retain a servant in his employment until the expiration of his term of service, notwithstanding he may have been guilty of misconduct for which he might have been dismissed, but was not, the master

* Reported by M. P. Burks, State Reporter.